

A Chor Phaik Har v Farlim Properties Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-333 OF 1993

B ABDUL HAMID OMAR CHIEF JUSTICE, EUSOFF CHIN CJ (MALAYA),
EDGAR JOSEPH JR, MOHAMED DZAIDDIN AND LAMIN FCJJ
9 SEPTEMBER 1994

C *Land Law* — *Restraints on dealings* — *Caveats* — *Interest in part of land* — *Whether caveat can be entered over whole land* — *Effect of proviso to s 322(1)* — *Particulars to be provided when entering caveat* — *National Land Code 1965 s 322(1), Forms 19A & 19B*

Statutory Interpretation — *Aids to construction* — *Proceedings of Legislature* — *Parliamentary reports (Hansard)* — *Whether permitted as an aid to interpreting statutes*

D The issue raised as a preliminary point of law by this appeal concerned the true meaning and ambit of the proviso to s 322(1) of the National Land Code 1965 ('the Code'), which states: 'Provided that such a caveat shall not be capable of being entered in respect of part of the land'. The question was whether a person claiming an interest in only part of the land could protect that interest by entering a caveat over the whole land.

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Held, answering the question in the affirmative and allowing the appeal:

F (1) The proviso to s 322(1) prohibits the entry of a caveat over part of the land, but says nothing about the validity of a caveat over the whole land which is limited to protect a registrable interest in a portion thereof. The proviso must be read having regard to the section itself and the Code as a whole. To say that the proviso prohibits a caveat to protect an interest in part of the land would mean that dealings in part of the land, which are permitted under the Code, would not be capable of being protected by caveat.

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H (2) The proviso to s 322(1) is purely declaratory of the principles enunciated in *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161. A person who claims a registrable interest in a portion of land may caveat the whole land, provided the caveat is expressly limited to protect only that claim, which must be an interest recognized under the Code as being either registrable or entitled to protection.

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(3) When applying for entry of a caveat, one should state one's interest in para 1 of Form 19B and, in para 2, give the grounds of the claim. One should also describe in Form 19A the particular interest claimed and the effect of the caveat.

(4) In construing a statute, a reference to Parliamentary reports of proceedings or Hansard, as an aid to statutory interpretation,

should be permitted where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity, provided that the statement reported in Hansard was made by a Minister or other promoter of a Bill. However, Hansard was only an aid to interpretation and could not be determinative of the issue for that would amount to substituting the words of the Minister or promoter of the Bill for the words of the statute. In this case, the Ministerial statement reported in Hansard did not assist the court at all.

[Bahasa Malaysia summary]

Isu yang telah ditimbulkan sebagai suatu perkara undang-undang permulaan oleh rayuan ini berkenaan dengan maksud dan lingkungan sebenar proviso kepada s 322(1) Kanun Tanah Negara 1965 ('Kanun itu'), yang menyatakan: 'Dengan syarat bahawa sesuatu kaveat tidak boleh dimasukkan berkenaan dengan sebahagian daripada tanah itu' ('Provided that such a caveat shall not be capable of being entered in respect of part of the land'). Soalan yang timbul adalah sama ada seseorang yang menuntut kepentingan di dalam hanya sebahagian daripada sebidang tanah boleh melindungi kepentingan itu dengan memasukkan suatu kaveat ke atas seluruh tanah itu.

Diputuskan, memberi jawapan yang positif dan membenarkan rayuan itu:

- (1) Proviso kepada s 322(1) melarang pemasukan suatu kaveat ke atas sebahagian daripada tanah itu, tetapi tidak menyatakan apapun mengenai keesahan suatu kaveat ke atas seluruh tanah itu yang dihadkan untuk melindungi suatu kepentingan boleh daftar di dalam sebahagian daripada tanah itu. Proviso itu mesti dibaca dengan memberi perhatian kepada seksyen itu sendiri dan Kanun itu pada keseluruhannya. Untuk mengatakan bahawa proviso itu melarang suatu kaveat yang melindungi suatu kepentingan di dalam sebahagian daripada tanah itu, bermakna bahawa urusan di dalam sebahagian daripada tanah itu, yang dibenarkan di bawah Kanun itu, tidak boleh dilindungi oleh kaveat.
- (2) Proviso kepada s 322(1) itu semata-matanya mengisytiharkan prinsip yang dinyatakan di dalam *N Vangedasalam v Mahadevan & Anor* [1976] 2 MLJ 161. Seseorang yang menuntut suatu kepentingan boleh daftar di dalam sebahagian tanah boleh memasukkan kaveat ke atas keseluruhan tanah itu, dengan syarat bahawa kaveat itu dihadkan secara nyata untuk melindungi hanya tuntutan itu, yang mesti merupakan suatu kepentingan yang diiktirafkan di bawah Kanun itu sebagai suatu kepentingan boleh daftar ataupun yang berhak untuk dilindungi.
- (3) Apabila memohon untuk pemasukan suatu kaveat, seseorang itu mesti menyatakan kepentingannya di dalam perenggan 1

- A Borang 19B dan, di dalam perenggan 2, memberikan alasan tuntutan tersebut. Seseorang itu juga seharusnya menerangkan di dalam Borang 19A kepentingan tertentu yang dituntut itu dan kesan kaveat tersebut.
- B (4) Apabila mentafsirkan sesuatu statut, rujukan kepada laporan prosiding Parlimen ataupun 'Hansard', sebagai suatu bantuan pentafsiran statut, seharusnya dibenarkan di mana enakmen itu taksa atau kabur, ataupun mungkin membawa kepada suatu maksud yang tidak munasabah, dengan syarat bahawa kenyataan yang dilaporkan di dalam Hansard itu telah dibuat oleh seorang Menteri atau penganjur lain sesuatu rang undang-undang.
- C Bagaimanapun, Hansard hanya merupakan suatu bantuan pentafsiran dan tidak boleh menentukan isu tersebut, kerana kalau tidak, perkataan yang digunakan oleh Menteri atau penganjur rang undang-undang itu akan menggantikan perkataan statut tersebut. Di dalam kes ini, kenyataan Menteri yang dilaporkan di dalam Hansard sama sekali tidak membantu mahkamah.]
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Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed) paras 1687–1775; [1989] *Mallal's Digest* 1084–1090, 1133–1134; [1990] *Mallal's Digest* 837–845; [1991] *Mallal's Digest* 1318–1328; [1992] *Mallal's Digest* 1187–1206; [1993] *Mallal's Digest* 970–980.

For cases on aids to construction of statutes, see 11 *Mallal's Digest* (4th Ed) paras 1279–1281; [1992] *Mallal's Digest* 1610.

Cases referred to

A-G (Canada) v Hallet & Carey Ltd [1952] AC 427 (folld)
Arataki Honey Ltd v Minister of Agriculture and Fisheries [1979] 2 NZLR 311 (folld)

Bouvy, ex p (No 3) (1900) 18 NZLR 608 (folld)

Canada Sugar Refining Co v R [1898] AC 735 (folld)

Cheatley v R (1972) 127 CLR 291 (folld)

Coyne v Brady (1863) 9 LT 30 (refd)

Davis v Johnson [1979] AC 264; [1978] 1 All ER 1132; [1978] 2 WLR 553 (not folld)

Farrell v Alexander [1977] AC 59; [1976] 2 All ER 721; [1976] 3 WLR 145 (folld)

Foster v Chief Adjudication Officer [1993] 1 All ER 705; [1993] 2 WLR 292 (folld)

Gelberg v Miller [1961] 1 All ER 291; [1961] 1 WLR 153 (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042; [1981] 2 WLR 322 (not folld)

Hatton v Beaumont [1977] 2 NSWLR 211 (folld)

Lai Khee-Chin Peter & Anor v Collector of Stamp Duties [1973] 2 MLJ 33 (refd)

Lord Nelson v Tucker (1802) 3 B & P 257 (refd)

- Low Kok Wai v PP* [1994] 1 SLR 676 (folld) A
- Memco Engineering Ltd, Re* [1986] Ch 86; [1985] 3 All ER 267; [1985] 3 WLR 875 (refd)
- Mullins v Treasurer of Survey* (1880) 5 QBD 170 (refd)
- PP v Lee Ngin Kiat* [1993] 2 SLR 181; [1993] 2 SLR 511 (CCA) (folld)
- Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42; [1992] 3 WLR 1032 (folld) B
- Raffles City Pte Ltd v A-G* [1993] 3 SLR 580 (folld)
- Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 (folld)
- Stubbings v Webb* [1993] 1 All ER 322; [1993] 2 WLR 120 (folld) C
- Tan Boon Yong v Comptroller of Income Tax* [1992] 2 SLR 472; [1993] 2 SLR 48 (CA) (folld)
- Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1 (not folld)
- Vangedaselam, N v Mahadevan & Anor* [1976] 2 MLJ 161 (folld)
- Warwickshire County Council v Johnson* [1993] 1 All ER 299; [1993] 2 WLR 1 (folld) D
- Young v Farrah & Nicholas Enterprises Pty Ltd* (1976) 13 SASR 444 (refd)

Legislation referred to

- National Land Code 1965 ss 214(1)(a), (b), 221, 322(1), (2) (3), 323(1), (2), 324, Pt Seventeen Ch 1 E
- Interpretation Act 1901 [Aust] s 15AB
- Interpretation (Amendment) Act 1993 [Sing] s 2

Appeal from: Originating Summons No 24-201-92 (High Court, Pulau Pinang) F

N Chandran (Jannu bte Babjan with him) (Lim Cheng Poh, Lim & Rahim) for the appellant.

RR Sethu (R Rajasingam with him) (R Rajasingam & Co) for the respondent. G

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): The preliminary point of law raised by this appeal resolves itself into the question of the true meaning and ambit of the proviso to s 322(1) of the National Land Code 1965 ('the Code'), inserted by s 90 of Act A587/84, which came into force on 25 March 1985, and which says: 'Provided that such a caveat shall not be capable of being entered in respect of a part of the land'. H

The main provision — in this case, s 322(1) of the Code — which the proviso seeks to qualify or modify — says: I

- A A caveat under this section shall be known as a 'private caveat', and —
- (a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;
- B (b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein: ...

Then, of course, follows the proviso reproduced above.

To put the matter in perspective, the other provisions of the Code which it would be convenient to reproduce are ss 322(2) and (3) and 323(1) and (2). These provisions are as follows:

- C 322(2) The effect of any private caveat expressed to bind the land itself shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of —
- D (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
- (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
- (c) any lien-holder's caveat in respect thereof.
- E (3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of —
- F (a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto); and
- (b) where that interest is a lease or sub-lease —
- (i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and
- (ii) any lien-holder's caveat in respect thereof.
- G 323(1) The persons and bodies at whose instance a private caveat may be entered are —
- (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
- H (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).
- I (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.

Now, the task of construing provisos is not always free from difficulty. (See *Gelberg v Miller* [1961] 1 All ER 291 at p 295; [1961] 1 WLR 153 at p 159.) A true proviso is something which qualifies or modifies the section to which it is a proviso. It must, therefore, be read having regard to the section itself. Generally speaking, the effect of a proviso is to take out of the section something that would otherwise fall within its ambit. This principle has been aptly put by Lush J (as he then was) in *Mullins v Treasurer of Surrey* (1880) 5 QBD 170 at p 173 as follows:

When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso.

However, commenting on this dictum, in his book on *Statutory Interpretation* (2nd Ed) at p 494, Mr Francis Bennion says this:

... whilst the substance of this dictum is undoubtedly correct, the treatment of the proviso as qualitatively different from the rest of the section is not. The entire section, including the proviso, is an operative component of the Act. (*Gubay v Kington (Inspector of Taxes)* [1984] 1 WLR 163 per Lord Scarman (dissenting, but not on this point at pp 169-170)).

In *Re Memco Engineering Ltd* [1986] Ch 86; [1985] 3 All ER 267; [1985] 3 WLR 875, Mervyn Davies J said ([1986] Ch 86 at p 98; [1985] 3 All ER 267 at p 274; [1985] 3 WLR 875 at p 883): 'A proviso is usually construed as operating to qualify that which precedes it'.

A proviso can also be inserted in a statute to make sure that the statute does not have the particular effect that it might have if the proviso were not inserted.

Before us, the main plank in the submission of leading counsel for the respondent, Mr Sethu, regarding this part of the case, was that by reason of the proviso, a person with a claim to title or interest in a portion of land, may not caveat at all, since he would be claiming an interest in part only of the land. In this he was supported by the judgment of the Supreme Court in *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1, which concerned a dispute between the beneficiaries of the estate of a deceased person. More particularly, the deceased had died testate, leaving, inter alia, eight parcels of land. Under the will of the deceased, a son of the deceased and his five brothers were each entitled to a one-sixth share in the estate. There was a dispute between members of the family concerning alleged breaches of a family arrangement, which resulted in an action commenced by the plaintiff and another brother against the other beneficiaries. To preserve the status quo pending the determination of the action, the plaintiff had entered a private caveat under s 323(1) of the Code against all the eight parcels of land on the ground that he was beneficially entitled to them.

The defendants then applied to have the caveat removed, and the High Court made an order directing removal of the caveat. From that decision the plaintiff appealed to the Supreme Court which, in dismissing the appeal, held:

- A (a) that the caveat was invalid for non-compliance with s 323(2) of the Code because although it related only to a limited interest in the eight parcels of land, yet it was expressed to bind the whole of the lands; and
- (b) the caveator plaintiff, being only a beneficiary under the will, had no caveatable interest until the estate had been fully administered.
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That would appear quite sufficient to dispose of the case. But, Azmi SCJ, speaking for the Supreme Court, went on to consider the effect of what he described as 'the new proviso' to s 322(1) of the Code, which was not in dispute, in the following terms [at pp 8-9]:

- C ... could a person who was only interested in a specific portion of land enter a caveat against the land, having regard to the new proviso to s 322(1) of the Code? With effect from 25 March 1985, a proviso has been added by Act A587 which provides: 'Provided that such a caveat shall not be capable of being entered in respect of a part of the land.'

- D In concluding his judgment in *Mosbert Bhd (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446, Seah SCJ, in referring to the new amendment observed at p 449 that the judgment of the court dealing with the private caveat 'would now seem to be of academic interest only'. We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited
- E only to that specific portion.

In our view the new proviso in s 322(1) had indeed affected the judgment of the Federal Court in *N Vangedasalam v Mahadevan & Anor* [1976] 2 MLJ 161. With the greatest of respect, the learned Lord President had correctly stated the law as it stood, at p 163:

- F '... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.'

- G The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under s 322 is now subject to an omnibus proviso that, 'such a caveat shall not be capable of being entered in respect of a part of the land'. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under s 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s 323(1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself. The legal position prior to *Vangedasalam* would now appear to be authoritative, which means that a person who is interested only in a specific portion of land cannot enter a caveat against the land ... If a person claimed only a limited title or interest in the alienated land, then his caveatable claim would be caught by the new proviso to s 322(1).
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- I

These remarks as to the effect of the proviso to s 322(1) were unnecessary to the conclusion and therefore really obiter dicta. Nevertheless, as the remarks were accompanied by a certain degree of deliberation, they must be regarded as valuable and therefore call for serious consideration. Before us, the point as to the effect of the proviso to s 322(1) arose acutely for decision, and was therefore argued in a way to bring it under much fuller consideration. Broadly stated, the point argued before us was whether its effect is to nullify the judgment of the Federal Court in *Vangedaselam* or to be merely declaratory of the legal position enunciated in *Vangedaselam*.

It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v R* (1972) 127 CLR 291, Barwick CJ said at p 296: 'In construing the section we are seeking Parliament's intention'. Similarly, in *A-G (Canada) v Hallet & Carey Ltd* [1952] AC 427, Lord Radcliffe said at p 449: '... every statute is to be expounded according to its manifest or expressed intention'.

To whom can the judges turn for help in their task of determining Parliament's intention? The orthodox view is not Parliament or the draftsman; they have to discover that intention from the words that Parliament has used in the particular statute. This proposition has been well brought out by Lord Simon of Glaisdale in *Farrell v Alexander* [1977] AC 59 at p 81; [1976] 2 All ER 721 at p 733; [1976] 3 WLR 145 at p 158:

... in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said. It is in this sense that 'intention' is used as a term of art in the construction of documents.

In *Hatton v Beaumont* [1977] 2 NSWLR 211, the court had occasion to observe at p 225:

The function of the court ... is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases ... such an intention is not expressed and the court's task is, by the application of the appropriate principles, to divine or impute that intention.

It is a truism that Parliament does not always use plain words to express its intention and when this is the case so that the words used fail to convey the intention, courts may then have to resort to the device of ascertaining that intention by necessary implication from the words which Parliament has used. Courts are, however, slow to find an intention by mere implication. (See *Young v Farrah & Nicholas Enterprises Pty Ltd* (1976) 13 SASR 444 at p 454 per Hogarth J).

Having said that, we must now turn to consider the problem of construction regarding the effect of the proviso to s 322(1).

- A Judith Sihombing in her work on the *National Land Code* (2nd Ed) has pointed out why, in her view, the proviso to s 322(1) is open to two interpretations. This is how she puts it (at pp 730 and 731):

The amendment in 1984 expressly said that a 'caveat shall not be capable of being entered in respect of part of the land'.

- B However, the amendment is not clear. For example, if the land is to be sub-divided and the purchaser is purchasing a part, then he might wish to caveat to protect the interest he has; this interest will be a right to claim a particular sub-divided part when the sub-division has been concluded. But what does the proviso say? There are two possibilities, namely:

- C (1) *the purchaser may not caveat at all* because he will be claiming an interest in part only of the land, and the proviso contains a proscription on such a caveat. Thus, in *Mosbert Bhd (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446, the caveator had caveated the whole of the land although her claim related to a part only. Thus the caveator:

- D 'could not lawfully lodge a private caveat expressed to bind the whole of the said land. Such a caveat would be defective and void as being contrary to the express provision of ss 322(1)(b), 323(2) and 324(2)(a) of the Code ... The learned judge [in the High Court] seemed to have recognized this and purported to order a remedial affidavit to be sworn by the respondent to rectify this error in the private caveat pursuant to s 417(2). In our opinion,
- E sub-s (2) does not empower the High Court to make such an order. The section is of limited application only and is intended to authorize the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the court affecting the land. It does not, in our judgment, give power to the court to allow a defective or void
- F private caveat to be amended by the caveator. For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one. (Seah SCJ, delivering the judgment of the court, at pp 448-449.)

- G The Supreme Court noted that the proviso had been added during the court hearing, so that part of the judgment relating to the caveat 'now seems to be of academic interest only' (at p 449); or

- H (2) *the purchaser may caveat* but restrict the effect of the caveat to that area over which he claims an interest. In other words, he uses the *Vangedaselam* approach. (Emphasis added.)

By way of illustration, the learned author says this:

- I Thus, in *Easow Plantations Sdn Bhd v Mosbert Bhd (In Liquidation)* [1988] 1 MLJ 298 the proprietor sub-divided the land and sold the lots prior to the issue of individual titles to the new lots so that the purchasers caveated, even though they had paid the full purchase price. The vendor went into liquidation and the liquidator sold the land to the appellant. Two appeals were heard together.

In one appeal it was unclear how the caveator had obtained its interest and although the caveat was to affect part only of the land, the 'missing link' (Salleh Abas LP (delivering the judgment of the court) at p 299) did not satisfy s 323(2). In the other case, the caveator had limited the caveat to affect the area of his purchase and the caveat could remain.

The learned author then expresses regret about the ambiguity of the proviso to 322(1) of the Code and makes some suggestions when she says this:

It is unfortunate that the amendment to the sub-section was not plainer so that there was no doubt that:

- (1) the claimant for part only of the land *could* caveat; and
- (2) the caveat should be over the whole of the land but expressed to cover part only. (Emphasis provided.)

If the caveat can then be entered, Form 19B should contain, where possible, a plan showing the extent of the caveated interest. Of course, in some cases, the interest claimed will not relate to a physical part of the land but to a share as co-proprietor (*Tee Chin Yong v Ernest Jeff* [1963] MLJ 118) for which no plan is possible.

We also note that the dicta of Azmi SCJ in *Tan Heng Poh* has come under heavy fire in an article by Mr Sethu himself, entitled 'Private Caveats Emasculated', reported in [1992] 2 MLJ xxv at p xxxv, who, as we have said, appeared as leading counsel for the respondent in the present appeal. In his article, by way of preliminary, Mr Sethu says:

The consequences of the decision is that the Seremban trilogy of cases [referring to *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118 per Ismail Khan J (as he then was); *Woo Yok Wan v Loo Peck Chee* [1975] 1 MLJ 156 per Ajaib Singh J (as he then was) and *Poh Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220 per Hashim Yeop A Sani J (as he then was)] have been reinstated. Whatever doubts there were in *Stella D'Cruz* [referring to *Mosbert Bhd v Stella D'Cruz* [1985] 2 MLJ 446 (SC) and, in particular, to the dictum of Seah SCJ at the end of his judgment, which indicates that with effect from the date of the coming into force of the new proviso to s 322(1) of the Code, no private caveat may be entered by the registrar against any land where the caveator is interested in a specific portion of it (even though its effect was expressly intended to be limited to that specific portion)] have been put to rest. There can be no caveat by a person claiming a partial interest in land and the prohibition cannot be circumvented.

On a pessimistic note, he adds:

The result is one of gloom and darkness. A person who buys a portion of an unsub-divided land or purchaser of a housing unit from a developer before the approval or issue of a sub-divided or strata title, is left without protection. Neither the buyer nor his financier can validly or effectively secure his interest in the land.

Referring to the impact of the dicta of Azmi SCJ in *Tan Heng Poh* on the practice of local banks in this area of the law, he says this:

- A The present practice of banks lodging private caveats over land, following an assignment of the sale and purchase agreement, has become invalid and useless.

He then offers certain solutions but draws attention to the practical difficulties involved in implementing them:

- B The only way out seems to be to obtain an undertaking from the bridging financier/chargee, that he would hold the main title subject to, and not part with the main title to the prejudice of, the purchaser. How many banks would assume or undertake this responsibility? In cases where there is no such bridging financier/chargee the situation is worse: the undertaking of the proprietor might prove to be worthless. It is to safeguard against the worthlessness of such undertakings that the claimant lodges caveats to have a hold on the land. The malaise (the unreliability of the developer's undertaking), which is the source of the problem, cannot become or provide the cure. The banks would either refuse to finance such purchases on the security of the property purchased or would require other collaterals. More stringent terms may also be imposed. How many consumers can afford to meet the stringent requirement of the banks? There must be provision at least in the cases of housing development, as defined in the Housing Developers (Control and Licensing) Act 1966 to permit caveats of portions of the land. In these cases the titles are bound to be issued as the developer cannot commence the development at least until the sub-division is approved.
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- D
- E In a final paragraph, he criticizes the proviso to s 322(1) for its lack of clarity and, in despair, makes a plea for Parliamentary intervention so that justice might be done to claimants with only partial interests in land. This is how he puts it:

- F While the law might have been made clear, justice remains to be done to claimants with only partial interests in land. After all they should also be protected. That protection can only be effected by suitable amendments to the 1965 Code. The courts are now powerless. What is the point of the 1965 Code recognizing partial interests in land, eg a transfer or a lease of a portion by registration when those putative rights prior to registration are not capable of protection by caveats? The decision of the Supreme Court must have been most disappointing but it was not altogether unexpected.
- G The fault lies in the legislation. The law might have been made certain. In the result injustice has occurred. We have reached the point where the situation cries for a remedy by Parliament.

Before we take our discussion on the point at issue further, there are some general observations which we should like to make regarding the problems which face the draftsman on the one hand and the court of construction on the other.

The draftsman's lot is indeed hard, requiring, as it undoubtedly must, a considerable degree of precision. A sympathetic voice has pointed out that:

- I There is nothing so common in the framing of instruments as that whilst the framer of them is studious to avoid one inconvenience, he incurs another which does not present itself to his view. This is often to be seen in Acts of

Parliament. (See *Lord Nelson v Tucker* (1802) 3 B & P 257 at p 275, per Heath J.)

A

And, on another occasion, the court had struck a note of true judicial humility when it observed:

The public are little able to appreciate the grounds of doubt in the breasts of different judges; and it naturally tends to bring the administration of the law into contempt, when they see before them conflicting interpretations of the same statute. This is a thing to be avoided where it can be. Every opinion of every judge is fallible; and this is a principle to be recognized in the expression of a decision. (See *Coyne v Brady* (1863) 9 LT 30 at p 31 per Monahan CJ.)

B

To resume our discussion on the point at issue. True it is that the proviso to s 322(1) prohibits the entry of a caveat over part of the land, yet it says nothing about the validity of a caveat over the whole land but whose effect is limited to protect a claim to a registrable interest in a portion or an undivided share thereof.

C

There are two sides to the coin. The arguments in support of the prohibition that a caveat must not be wider than is justified by the caveator's interest, are formidable, the more obvious ones being, so far as the caveatee is concerned, it would be manifestly unjust that he should be prevented from dealing with the whole of his land when the caveator's claim relates only to part thereof; so far as a purchaser or other persons dealing with the caveatee are concerned, they have a right to know precisely what hostile claims to the land confront them; so far as the proper registering authority is concerned, he has a right to know how he should respond to other dealings with parts of the land on the register document of title.

D

E

Having said that, it is difficult to rebut the contention that it would be unjust to deny the remedy of a caveat to a person claiming an estate or a proprietary interest in part of a parcel of land. Reason and justice indicate that the types of interest in land which will afford sufficient grounds for lodging a caveat should be confined to the number of permissible interests in land recognized under the Code as being either registrable or entitled to protection (*Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 per Lord Diplock at p 47).

F

G

Similarly, Woodman and Nettle in their work on the *Torrens System in New South Wales*, at p 524/19, para 74F.7 (release 7) say this:

The number of interests which will support a caveat is limited by the number of permissible interests in land. Section 74F makes it clear that a caveator must claim an estate or interest in land, and any proprietary interest at law or in equity supports lodgment and extension of a caveat.

H

To take our discussion further, the Code confers upon a registered proprietor the right to deal with his land either in whole or in part; for example, he may lease part of his land (s 221) or, if he is a registered co-proprietor, he is at liberty to transfer (s 214(1)(b)) or to charge (s 241(1)(b)) the whole of his undivided share in his land or he may grant an easement over a portion of the servient land (see Pt Seventeen Ch 1).

I

A In so holding, we have not overlooked s 214(1)(a) which bars the transfer of part only of alienated land. But the case of *Peter Lai Khee-Chin & Anor v Collector of Stamp Duties* [1973] 2 MLJ 33 shows, in our view correctly — that a transfer from the registered proprietor to himself and the purchaser does not contravene s 214(1)(a). Such dealings create interests in land capable of being registered under the Code.

B Having regard to the categories of persons specified in s 323(1)(a) of the Code, at whose instance a caveat may be entered, it would appear that a person claiming as such lessee, transferee, chargee or grantee of the easement, respectively, as aforesaid, would be entitled to take advantage of the caveat procedure unless, of course, the proviso to s 322 of the Code has the effect of barring the entry of a caveat by such persons.

C However, the words of the proviso must be read in their context. By this is meant, we must not only read the words of the proviso in the light of s 322 as a whole but also in the light of the Code as a whole. Thus, it was said by the court in *Arataki Honey Ltd v Minister of Agriculture and Fisheries* [1979] 2 NZLR 311 at p 316:

The Act must be read as a whole and that all sections must be read bearing in mind the provisions of other sections. It is not necessary for one section to refer specifically to another section before the first section can be construed as being subject to or overriding or in some other way qualifying the other section.

E So, also, in *Canada Sugar Refining Co v R* [1898] AC 735, Lord Davey said (at p 741):

F Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

G If, therefore, a section is open to two different constructions, a consideration of that section in the context of the Act in which it appears, may indicate which of the two constructions is to be given to the section. As Stout CJ said in *Ex p Bouvy (No 3)* (1900) 18 NZLR 608 at p 613:

In order to maintain that position, reliance is placed on s 15 ...; and s 15, standing by itself, is no doubt wide enough to cover such an appeal ... We have, however, to look at the whole statute, and not only at a special section of it.

H It is with the above principles of construction in mind that we revert to the issue at hand.

I We accept, particularly, in the face of the passages in Judith Sihombing's book which we have quoted, that the proviso to s 322(1) is open to two constructions; broadly stated, on the one hand, that its effect is to nullify *Vangedaselam* and, on the other, that its effect is to be merely declaratory of *Vangedaselam*.

The stumbling block in the way of accepting the contention of Mr Sethu that the proviso to s 322(1) nullifies *Vangedaselam*, is that, if

correct, it would lead to the startling conclusion that the types of dealings in part of the land although permitted under s 221 or para (b) of s 214(1), or para (b) of s 241(1) or Pt Seventeen, Ch 1 (described above), will not give rise to an interest in land capable of being protected by caveat. This may cause great hardship to one claiming an interest as lessee, transferee, chargee or grantee of an easement in such dealings, but one can also see that equal hardship would be caused to a caveatee who is prevented from dealing with the whole of his land where the caveator's claim relates only to part thereof.

In these circumstances, reading the proviso not only in the light of s 322 as a whole but in the light of the provisions of the other related sections in the Code to which we have referred, we consider that we would not be justified in acceding to the contention of Mr Sethu.

In other words, we would answer the question arising upon the preliminary point of law in favour of the appellant caveator; that is to say, that the proviso to s 322(1) is purely declaratory of the principles enunciated in *Vangedasalam*.

In particular, we endorse the following passages in the judgment of Suffian LP in *Vangedasalam*.

On the scope of ss 322, 323 and 324, his Lordship said ([1976] 2 MLJ 161 at pp 162-163):

I am of the opinion ... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

On the steps to be complied with by he who wishes to enter a private caveat to protect only a particular interest in land, his Lordship said (at p 163):

In that event when applying for entry of a caveat he should so state in Form 19B in para 1, and in para 2 he should give the grounds of his claim. (He should not claim a caveat to be expressed to bind the land itself.) He should also cause to be inserted in Form 19A a description of the particular interest claimed and a description of the effect of the caveat.

Advising further on the drafting of such caveat, he added (at p 164):

... when applying for the caveat you state the nature of the registrable interest you claim, you do not use mere general words, you do not claim more than what is warranted, the caveat sufficiently states the quantum of the estate or interest which you claim, and you limit the prohibition of your caveat to such dealings as your claim, if well founded, entitles you to forbid.

That, however, is not the end of the matter.

In an additional submission in writing dated 4 April 1994, put in after the court had reserved judgment, Mr Sethu had sought to rely on the Hansard reports; in particular, he had sought to rely on the statement of the Minister concerned made in Parliament when introducing the National Land Code (Amendment) Bill 1984; which led to the enactment of the

- A proviso to s 322(1), in support of his contention regarding the true construction of the proviso.

We therefore reassembled to give counsel on both sides an opportunity to address us on this important point of statutory interpretation.

- B The historic rule of the common law, has been, until the landmark decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42; [1992] 3 WLR 1032, that it is not permissible, when construing a statute, to refer to the reports in Hansard of proceedings in either House of Parliament. (See *Davis v Johnson* [1979] AC 264; [1978] 1 All ER 1132; [1978] 2 WLR 553; *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191; [1982] 1 All ER 1042; [1981] 2 WLR 322.)
- C The traditional basis for this rule — the exclusionary rule — being that written instruments should be construed having regard to what is within the four walls of the written instruments, all external references being excluded.

- D However, in the landmark decision of *Pepper v Hart*, the House of Lords, by a majority of 6 to 1 (Lord Mackay LC dissenting) held that subject to any question of Parliamentary privilege, the exclusionary rule should be relaxed in certain circumstances. What these circumstances are, appear sufficiently from the leading speech of the House delivered by Lord Browne-Wilkinson ([1993] 1 All ER 42 at p 64; [1992] 3 WLR 1032 at p 1056A-C):

- E My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is
- F ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other
- G promoter of the Bill is likely to meet these criteria.

It follows that the majority of the House refused to follow the previous decisions of the House which supported the orthodox view, thus applying the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

- H In three subsequent cases which followed closely on the heels of *Pepper v Hart* — namely, *Warwickshire County Council v Johnson* [1993] 1 All ER 299; [1993] 2 WLR 1; *Stubbings v Webb* [1993] 1 All ER 322; [1993] 2 WLR 120 and *Foster v Chief Adjudication Officer* [1993] 1 All ER 705; [1993] 2 WLR 292 — the House of Lords referred to Hansard as an aid to statutory construction.

- I We note that in Singapore, the courts have followed the majority judgment in *Pepper v Hart*. (See *Tan Boon Yong v Comptroller of Income Tax* [1993] 2 SLR 48 at p 55, reversing [1992] 2 SLR 472; *PP v Lee Ngin Kiat* [1993] 2 SLR 181, affirmed [1993] 2 SLR 511. Indeed, the rule in *Pepper*

v Hart has now received generous statutory recognition there in s 2 of the Interpretation (Amendment) Act 1993. (See *Raffles City Pte Ltd v A-G* [1993] 3 SLR 580 at pp 587–588; *Low Kok Wai v PP* [1994] 1 SLR 676 at p 684D–E.) This follows similar amendments made in Australia in 1984 to the Interpretation Act 1901, by the insertion of s 15AB which permits reference to Hansard reports as an aid to statutory interpretation. In New Zealand, the rule in *Pepper v Hart* is followed by the courts, though it has not been placed on a statutory footing. (See Jim Evans on *Statutory Interpretation* (1989, OUP) (New Zealand), at pp 290–291.)

We have also considered the cogent criticisms of the majority view in *Pepper v Hart*, by Mr JH Baker in his article entitled ‘Statutory Interpretation and Parliamentary Intention’ (1993) 52 Camb LJ 353; by Mr Brian Davenport in his article entitled ‘Perfection — But At What Cost?’ (1993) 109 LQR 149; and by Mr David Miers in his article entitled ‘Taxing Perks and Interpreting Statutes’ (1993) 56 MLR 695. Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity and provided always that the statement reported in Hansard was made by a Minister or other promoter of a Bill. More particularly, we gratefully adopt the passage in the judgment of Lord Browne-Wilkinson in *Pepper v Hart*, reproduced above.

We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an *aid* to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

We therefore proceeded to consider the various passages in the Ministerial statement reported in Hansard, relied upon by Mr Sethu, with a view to resolving the ambiguity in the proviso to s 322(1) to which we have referred, but having done so, we have arrived at the conclusion that they do not assist us at all.

In these circumstances, we see no reason to depart from what we have hereinbefore said regarding the effect of the proviso to s 322(1).

The appellant is therefore entitled to succeed on the preliminary point of law, but as there are other objections to the caveat, the hearing thereof, will be adjourned to a date to be fixed by the registrar.

Appeal allowed.

Reported by Prof Ahmad Ibrahim